IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1510

SURETY TITLE INSURANCE AGENCY, INC.,
Petitioner,

v.

VIRGINIA STATE BAR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

ROBERT B. HUMMEL
1229 19th Street, N.W.
Washington, D.C. 20036
(202) 872-6761

Attorneys for the Petitioner

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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OPINIONS BELOW

The opinion of the District Court is reported at 431 F. Supp. 298 (E.D. Va. 1977) and is reproduced beginning at page 7a of the Appendix. The opinion of the Court of Appeals is not yet reported, and is reproduced beginning at page 1a. No opinion was issued in connection with the order of the Court of Appeals denying rehearing and rehearing *en banc.* (32a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 1, 1978. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on April 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was invoked under 15 U.S.C. §§ 15 and 26 and 28 U.S.C. § 1337.

QUESTION PRESENTED

In a federal antitrust action, when an issue is presented as to the applicability of the state action exemption under *Parker v. Brown*, 317 U.S. 341 (1943), does the doctrine of abstention require a federal court to refer the question to the local state courts for their views?

STATEMENT OF THE CASE

Petitioner, a small local agency engaged in the business of selling title insurance for out-of-state insurance companies, filed this action against respondent Virginia State Bar (the "State Bar") on April 26, 1976, in the United States District Court for the Eastern District of Virginia, seeking treble damages and an injunction under the Sherman Act, 15 U.S.C. §§ 15 & 26. In order to reduce the cost to consumers and to provide a better product for less money, petitioner decided to sell title insurance directly to homebuyers and not to utilize the intermediary services of an attorney, as is customary in Virginia. However, the State Bar, in a series of Unauthorized Practice of Law opinions ("UPLs"), purported to include such direct sales of title insurance by non-lawyers in the definition of the practice

of law.[1] Because those unilaterally-imposed Bar restrictions seriously interfered with petitioner's business, it filed this antitrust action.

In 1938 the Virginia legislature had authorized the Virginia Supreme Court to define the practice of law, which it promptly did with the assistance of the Bar and an opportunity for public comment. Those definitions have not been amended or supplemented since then, but the State Bar has issued a number of UPLs, which claim to interpret these definitions, and which have as their primary purpose the deterrence of lay persons from engaging in the conduct which the Bar contends constitutes the practice of law. The Bar issues such opinions by a majority vote of its elected governing body, the Bar Council, with no public participation, with no rules of evidence or procedure, and with no examination of, let alone active supervision over, the preparation or substance of any UPL by the Virginia Supreme Court. Because the unauthorized practice of law in Virginia is a misdemeanor, Va. Code § 54-44, the desired effect of deterring competition has occurred, and until petitioner began its business, no one had attempted to traverse the boundaries that the State Bar had established in the three UPLs relevant to this case.

In the real estate area particularly, the Bar has another powerful weapon. Disciplinary Rule 3-101, which is binding on all attorneys in Virginia, prohibits any attorney from participating in any transaction in which a lay person is engaging in conduct which the Bar contends constitutes the unauthorized practice of law. The Virginia Supreme Court has ruled that only a member of the Bar may prepare a

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[1] *See* UPLs 17, 43, and 44 (12a-14a).

real estate deed,[2] and therefore an attorney must participate in every sale of a residence. Because the Bar, through DR 3-101, has directed its members to withhold their services in any transaction in which a lay person is violating any of their UPLs, attorneys are obliged not to prepare the necessary deed if persons such as petitioner deal directly with homebuyers in the sale of title insurance, contrary to UPLs 17, 43, and 44. Thus, although the Virginia Supreme Court has never spoken on the relationship between the practice of law and the sale of title insurance, the State Bar on its own has issued opinions the purpose and effect of which are to keep this lucrative business for its members.

Following the filing of an amended complaint in the District Court, full discovery was undertaken, and a detailed stipulation with 34 exhibits was submitted by the parties on cross-motions for summary judgment on the issue of liability under the antitrust laws. On April 25, 1977, Judge Mehrige granted petitioner's motion for summary judgment and entered an order enjoining respondent "from issuing any further opinions or documents purporting to define the practice of law and [directing it] to expunge from its records all such prior opinions . . . ." (30a-31a). The Court analyzed the conduct of respondent, including the process by which UPLs are issued, and concluded that it constituted both a group boycott and an attempt to monopolize under sections 1 and 2 of the Sherman Act, under both the *per se* and rule of reason tests. (15a-18a). In reaching that result, the Court recognized that the UPL process "places attorneys in the unique posture of being able to define the extent of their own monopoly." (27a).

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[2] *Commonwealth v. Jones & Robins, Inc.*, 186 Va. 30, 41 S.E.2d 720 (1947).

Next, it carefully considered the claimed state action exemption under *Parker v. Brown*, 317 U.S. 341 (1943), and concluded that, although the Virginia Supreme Court had approved the Bar's rules which provide for the issuance of UPLs, respondent was not entitled to an exemption because "not only is the Unauthorized Practice of Law opinion process tenuously related to the state interest it purports to advance, but it operates in a decidedly anticompetitive fashion offensive to notions of basic fairness. It does not act to advance the consumer interest, but merely that of the attorney. It is neither necessary to, nor are its anticompetitive effects reasonable in light of, the justifying state interest." (28a-29a). The Court declined to rule at that time on the availability of damages in light of the pendency before this Court of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), but did enter the injunctive relief requested, and that order was appealed pursuant to 28 U.S.C. § 1292(a)(1).

In the Fourth Circuit, respondent submitted a detailed brief raising a series of objections to the merits of the decision below. Petitioner filed its brief answering each of those points, and respondent filed a reply in which it added several new arguments, including one rejected by the District Court (8a, n.3), that the Court should abstain to await the outcome of a state-court civil action, which was brought shortly before the hearing on the motions for summary judgment in the District Court, and which alleged that petitioner was engaged in the unauthorized practice of law by selling title insurance directly to homebuyers. At the request of respondent, because of the importance of the case, the Court of Appeals held oral argument on an expedited basis on October 4, 1977.

On March 1, 1978, the Court issued an opinion written by Senior District Judge Thomsen, joined in by Circuit Judges Russell and Hall, which vacated the decision below and remanded the case "with instructions to withhold further action until the final decision of the Supreme Court of Virginia in the case filed by the Attorney General against the plaintiff herein. . . ." (6a). Without discussing the merits of petitioner's antitrust claims, the Court of Appeals proceeded directly to the *Parker* issue. It quoted from, but did not discuss, this Court's decisions in *Bates v. State Bar of Arizona, supra,* and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), which indicate that the relationship between organizations such as the State Bar and the State itself (in this case the Virginia Supreme Court) in the activity under challenge (here the UPL opinion issuing process) was a vital aspect of the state action defense. It mentioned in passing this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which involved a similar state action claim by this very respondent, but did not even note the seminal decision in *Parker* itself. Then the Court observed:

> In the instant case the role of the Supreme Court of Virginia is not so clear. It is unfortunate that Virginia has not adopted a statute or rule which would permit us to certify this question of state law, crucial to a decision in this case, to the highest court of the State of Virginia. (5a).

The Court then pointed to the pending action in the Circuit Court of Virginia Beach and observed that the decision in that case "will have to deal with the respective roles of the Supreme Court of Virginia and [respondent] in the adoption and enforcement of the disciplinary rules and other issues presented by the case at bar." (6a). From

that assertion, the Court concluded, without citation to any authority, that the federal courts should withhold judgment "until the Virginia courts have had an opportunity to decide the disputed questions of state law." *Id.* A timely petition for rehearing, with a suggestion for rehearing *en banc*, was filed on March 15, 1978, and denied without opinion on April 3, 1978.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals represents a fundamental deviation from prior decisions of this and every other court that have considered the applicability of the state action exemption. Although the court below does not use the term "abstention," it has applied a new form of it, for which it provided neither citation nor analysis, in order to help it resolve the state action issue under *Parker v. Brown, supra.* Although the meaning and effect of state laws have been in dispute and of crucial importance in cases such as *Cantor v. Detroit Edison Co., supra,* and *City of Lafayette v. Louisiana Power & Light Co.*, __U.S. __, 46 U.S.L.W. 4265 (March 29, 1978), the court below is the first tribunal to suggest that these questions could be resolved, or their resolution in any way aided, by an interpretation by state courts of the scope of the antitrust exemption. Moreover, since the state courts cannot finally resolve any issue in the antitrust case, it is apparent that the abstention ordered here is a different kind from that employed in any previous decision.

That the abstention ordered is a different variety from that involved in such cases as *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny, is apparent from an analysis of the issues in the federal and state cases here. Although

Younger-type abstention was urged upon both the District Court and the Court of Appeals by respondent, it is applicable only if the issue on which abstention is based is identical to one pending in a state court. However, it is undisputed that in this instance the state court action does not involve the relationship between the State Bar and the Supreme Court of Virginia in the issuance of UPLs, but is solely concerned with whether petitioner violated the Supreme Court's definitions of unauthorized practice, not the Bar's UPLs. Moreover, regardless of whether the issues were identical, this Court has made it clear, most recently in *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 637-38 n. 8, and 662 (1977), that a plaintiff's violation of state laws is irrelevant in determining its right to recover damages resulting from a defendant's violation of the antitrust laws. As this Court said in *Fashion Originators' Guild v. Federal Trade Comm.*, 312 U.S. 457, 468 (1941): ". . . even if [the charge which the antitrust defendants made against those whose activities they were boycotting] were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of Federal law." In addition, the state court action here involves different parties, and it was commenced nearly eight months after the antitrust action was brought and after the hearing on the issue of liability had been scheduled. *Compare Hicks v. Miranda*, 422 U.S. 332 (1975).

Thus, it is apparent that the ruling of the Court of Appeals does not depend on the existence of a prior action in a state court. Since no standards were offered by the Court to indicate in what circumstances abstention would be required, it must be assumed that an independent suit must be brought in state court seeking a declaratory judg-

ment (or perhaps, more precisely, an advisory opinion) as to the applicability of state law in every case of a claimed *Parker* exemption, even in civil enforcement actions brought by the Department of Justice. That kind of "abstention" will produce inordinate delays in enforcing the federal antitrust laws since plaintiffs will be at the mercy of state court backlogs as a precondition to proceeding with their federal actions. Such delays are particularly indefensible in cases such as this where there was a fully stipulated record, clearly establishing the relation between the State Bar and the Virginia Supreme Court for purposes of the state action defense.

Conceivably, the result might be tolerable if the state courts could decide anything, but there is no state law question involved in this antitrust case, let alone a dispositive one. Thus, after securing the judgment of the highest court of Virginia, which itself created the State Bar and established its rules on issuing UPLs, the case must return to the federal courts because the question to be decided is one of federal law, *i.e.*, are the anticompetitive activities of the State Bar shielded from the federal antitrust laws because of the involvement of a sovereign state in them? *See Parker v. Brown, supra; Cantor v. Detroit Edison Co., supra*, 428 U.S. at 592-97. Therefore, the abstention employed here cannot be analogized to that in *Railroad Comm. of Texas v. Pullman Co.*, 312 U.S. 496 (1941), where this Court permitted a federal action to be deferred pending potentially determinative proceedings in a state court, since the state case here cannot resolve the *Parker* issue no matter what its views are on the state law questions. Moreover, even if the unauthorized practice issue is decided in petitioner's favor in the state courts, so that it will be free to conduct its title insurance business free of the State Bar's

boycott, its treble damage claim based on past acts of the State Bar will remain, and that will require a full antitrust determination in order to resolve. The futility of the appellate court's direction to abstain is further underscored by the fact that the state courts have no independent jurisdiction to determine the merits of antitrust cases. *See, e.g., Vendo Co. v. Lektro-Vend Corp., supra,* 433 U.S. at 632 and 664 n. 38, and the cases cited therein.[3]

The decision of the Fourth Circuit severely interferes with the vital Congressional objective of furthering the private and public enforcement of the antitrust laws. It will impose enormous burdens of cost and delay on all antitrust plaintiffs and will create a new, uncertain, and never before suggested role for state courts in the antitrust area. Because of the potentially disastrous effects that this decision will have on antitrust enforcement, and because of the opportunities it presents for wholesale avoidance of difficult questions by federal judges who will find in the decision below an excuse to refer matters to the state courts, this Court should grant the petition.

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[3] Nor would reference under the doctrine of primary jurisdiction authorized in *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973), be proper. That doctrine applies only if Congress has enacted the other legislation (409 U.S. at 300), if the reference will be of "material aid in resolving the immunity question" (409 U.S. at 302), and where there are disputed factual issues relating to "the customs and practice of the industry and of the unique marketplace involved" on which the agency's views (not a court's) are likely to be helpful (409 U.S. at 305).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted. In addition, because the decision below is so lacking in authority and deviates so far from accepted principles of antitrust law, summary disposition would also be appropriate.

Respectfully submitted,

ALAN B. MORRISON
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

ROBERT B. HUMMEL
1229 19th Street, N.W.
Washington, D.C. 20036
(202) 872-6761

Attorneys for the Petitioner

April 21, 1978

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-1703

VIRGINIA STATE BAR,

Defendant-Appellant,

v.

SURETY TITLE INSURANCE AGENCY, INC.,

Plaintiff-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, Richmond Division. Robert R. Merhige, Jr., District Judge

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Argued October 4, 1978 Decided March 1, 1978

Before RUSSELL and HALL, Circuit Judges, and THOMSEN,* Senior District Judge

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John Hardin Young, Assistant Attorney General, and Anthony F. Troy, Attorney General of Virginia, for Appellant; Alan B. Morrison (Robert B. Hummel and Stephen W. Bricker, on brief) for Appellee.

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*Of the United States District Court for the District of Maryland, sitting by designation.

Thomsen, Senior District Judge

Surety Title Insurance Agency, Inc. (Surety) filed this action against the Virginia State Bar (VSB) in the district court, claiming that certain advisory opinions issued by the VSB, coupled with the threat of disciplinary proceedings against those attorneys who disregard the advisory opinions, illegally restrain commerce in tne area of title insurance and constitute an illegal group boycott and an attempt to monopolize, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. The district court noted:

> "Plaintiff does not challenge either the definition of the practice of law as enunciated by the Supreme Court of Virginia nor the correctness of any particular ethical or unauthorized practice of law opinion. Rather, it is the method by which these opinions are issued that is alleged to be in violation of the federal antitrust laws."

Surety Title Insurance Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298, 300 (E.D. Va. 1977).

The VSB contended below and contends here that the relief requested is barred, *inter alia*, by the state-action exemption to the Sherman Act.

Cross motions for summary judgment on the issue of liability were filed, accompanied by a stipulation of facts, which included references to the appropriate statutes,[1] rules of the Supreme Court of Virginia[2] and opinions of the VSB.[3]

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[1] Va. Code Ann. §§ 54-48 and 49 (Repl. Vol. 1974); *see also* § 54-44.

[2] *See, inter alia*, Rules of the Supreme Court of Virginia, 171 Va. xvii; 205 Va. 1038, *et seq.*; 216 Va. 1062, 1141, 1143, 1146-47, 1173-74.

[3] Unauthorized Practice of Law Opinions Nos. 17 (1942), 43 (1974), and 44 and 46 (1975); and Ethics Committee Opinion 177 (1975).

After argument, the district court concluded that the state action exemption is not available to the VSB in this case. The court noted, however, that the defense to monetary liability may be available to the VSB on notions of fairness; with respect to that issue the court said:

> "The issuing of the opinion resulting in the anti-competitive activity here was required by the state. The Court will request that the parties address this issue further after the Court and counsel have the benefit of the Supreme Court's opinion in the case of *Bates v. State of Arizona* which is anticipated before the Court's current term ends in June." 431 F. Supp. at 309.[4]

The decision in *Bates v. State Bar of Arizona*, ____ U.S. ____, 97 S. Ct. 2691 (1977), was indeed rendered on

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[4] The following order was entered by the district court:

"For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED as follows:

(1) Defendant's motion for summary judgment be, and the same is hereby denied; and

(2) The motion of the plaintiff for summary judgment be, and the same is hereby, in part, granted in the following respects: (a) the issuance by defendant of opinions [or] similar documents purporting to define the practice of law is unlawful and in the instant case is violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; (b) the defendant, Virginia State Bar, its officers, agents and employees be, and they are hereby, enjoined from issuing any further opinions or documents purporting to define the practice of law and said defendant is directed to expunge from its records all such prior opinions; further, the defendant, Virginia State Bar, through its appropriate officer shall forthwith notify its membership of said expungement.

"All other matters in issue are hereby continued."

June 27, 1977. After distinguishing *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court held flatly that "the challenged restraint [in *Bates*] is the affirmative command of the Arizona Supreme Court under its Rule 27(a) and 29(a) and its Disciplinary Rule 2-10 (b). That Court is the ultimate body wielding the State's power over the practice of law, see Ariz. Const. Art. 3; *In re Bailey*, 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraining is 'compelled by direction of the State acting as a sovereign.' 421 U.S., at 791." (Slip. opinion p. 8), 97 S. Ct. at 2697. The Court added a footnote (#11) at that point in the Bates opinion, as follows: "We note, moreover, that the Court's opinion in *Goldfarb* concluded with the observation that '[i]n holding that certain anticompetitive conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.' 421 U.S. at 793. Allowing the instant Sherman Act challenge to the Disciplinary Rule would have precisely that undesired effect." ____ U.S. at ____(slip opinion p. 8), 97 S. Ct. at 2697.

After analyzing *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the Court said: "Here, the appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. *In re Wilson*, 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the appellee acts as the agent of the court under its continuous supervision." ____U.S. at ____ (slip opinion p. 9). 97 S. Ct. at [2]697. Further distinguishing *Cantor*, the Court said:

> "In contrast, the regulation of the activities of the bar is at the core of the State's power

to protect the public. Indeed, this Court in *Goldfarb* acknowledged that '[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been "officers of the courts."' 421 U.S. at 792. See *Cohen v. Hurley*, 366 U.S. 117, 123-124 (1961). More specifically, controls over solicitation and advertising by attorneys have long been subject to the State's oversight. Federal interference with a State's traditional regulation of a profession is entirely unlike the intrusion the Court sanctioned in *Cantor*." ____U.S. ____ (slip opinion p. 10), 97 S. Ct. at 2698.

> "Finally, ... The disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior. Moreover, as the instant case shows, the rules are subject to pointed re-examination by the policy maker – the Arizona Supreme Court – in enforcement proceedings. Our concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation; we deem it significant that the state policy is so clearly and affirmatively expressed and that the State's supervision is so active." Id.

In the instant case the role of the Supreme Court of Virginia is not so clear. It is unfortunate that Virginia has not adopted a statute or rule which would permit us to certify this question of state law, crucial to a decision in this case, to the highest court of the State of Virginia. However, as the district court noted in a footnote to its opinion: "Sub-

sequent to the filing of this action, the Attorney General of Virginia filed a Bill of Complaint against the plaintiff charging it with the unauthorized practice of law. The Bill and subpoena issued by the Clerk of the Circuit Court of Virginia Beach were served on the plaintiff on December 16, 1976. A challenge to the substance of the State Bar's opinions on the unauthorized practice of law as they relate to title insurance may be expected in the state court proceeding." 431 F. Supp. at 300 n.2. We are advised that no decision has yet been rendered in that case, but counsel have sent us copies of the pleadings therein, and stated that the matter will be set for a docket call in April 1978. The decision in that case, at *nisi prius* and on appeal, will have to deal with the respective roles of the Supreme Court of Virginia and the VSB in the adoption and enforcement of the disciplinary rules and other issues presented by the case at bar. We believe that it would be in accord with appropriate federal-state relations for the federal courts to withhold final decision on the issues presented by this case until the Virginia courts have had an opportunity to decide the disputed questions of state law.

We, therefore, vacate the order of the district court, and remand the case with instructions to withhold further action until the final decision of the Supreme Court of Virginia in the case filed by the Attorney General of Virginia against the plaintiff herein, referred to in footnote 2 of the opinion of the district court, unless the Attorney General is responsible for any unreasonable delay in such decision.

Vacated and Remanded,
with instructions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

[Filed April 25, 1977]

SURETY TITLE INSURANCE AGENCY, INC., Plaintiff,	)	
v.	)	Civil Action No. 76-0180-R
VIRGINIA STATE BAR, Defendant.	)	

MEMORANDUM

Plaintiff, Surety Title Insurance Agency, Inc. (Surety), brings this action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, to redress injuries to its business allegedly incurred by virtue of actions of the defendant, Virginia State Bar. Plaintiff seeks monetary, injunctive and declaratory relief. Jurisdiction is attained pursuant to 15 U.S.C. §§ 15 and 26 and 28 U.S.C. § 1337. The matter comes before the Court on cross-motions for summary judgment as to liability. The issues have been briefed and argued by counsel, and the matter is ripe for disposition.

The gist of the plaintiff's complaint is an allegation that the defendant's practice of issuing advisory opinions relating to ethics and the unauthorized practice of law, coupled with

the threat of disciplinary proceedings,[1] illegally restrain commerce in the area of title insurance. Specifically, the plaintiff maintains that the defendant's actions constitute an illegal group boycott and an attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Plaintiff does not challenge either the definition of the practice of law as enunciated by the Supreme Court of Virginia nor the correctness of any particular ethical or unauthorized practice of law opinion.[2] Rather, it is the method by which these opinions are issued that is alleged to be in violation of the federal antitrust laws.[3] A description of the opinion issuing process as it relates to

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[1] Rules of the Supreme Court of Virginia, Part Six, Rule 6:II, DR 3-101(A) subjects attorneys to disciplinary action should they "aid a non-lawyer in the unauthorized practice of law." 216 Va. 1090 (1976).

[2] Subsequent to the filing of this action, the Attorney General of Virginia filed a Bill of Complaint against the plaintiff charging it with the unauthorized practice of law. The Bill and subpoena issued by the Clerk of the Circuit Court of Virginia Beach were served on the plaintiff on December 16, 1976. A challenge to the substance of the State Bar's opinions on the unauthorized practice of law as they relate to title insurance may be expected in the state court proceeding.

[3] Thus, there is no question of state law presented in this case which would call for the invocation of the exceptional doctrine of abstention. *Colorado River Water Conservation Dist. v. United States*, __U.S.__, 44 U.S.L.W. 4372, 4376 (U.S., March 24, 1976). Moreover, resolution of the issues presented in this case would not interfere with the action brought by the Attorney General of Virginia against the plaintiff. The two actions simply present different issues. Thus, *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny are not applicable. *See Consumers Union of United States, Inc. v. American Bar Ass'n*, __F. Supp.__ ,C.A. No. 75-0105-R, Sl. Op. 11-15 (E.D. Va. 1976).

title insurance is appropriate to provide the factual predicate for the Court's conclusions.

The Supreme Court of Virginia is legislatively empowered to define what constitutes the practice of law. Va. Code Ann. § 54-48(a) (Repl. Vol. 1974). Pursuant to this statute and its inherent authority, the Supreme Court of Virginia in 1938 defined the practice of law, in pertinent part, as follows:

> "Generally, the relation of attorney and client exists, and one is deemed to be practicing law, whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.
>
> Specifically, the relation of attorney and client exists, and one is deemed to be practicing law, whenever –
>
> (1) One undertakes for compensation, direct or indirect, to advise another, not his regular employer, in any matter involving the application of legal principles to facts or purposes or desires.
>
> (2) One, other than as a regular employee acting for his employer, undertakes, with or without compensation, to prepare for another legal instruments of any character, other than notices or contracts incident to the regular course of conducting a licensed business. . . ."

Rules of the Supreme Court of Virginia, Part Six, Rule 6:I, 216 Va. 1062 (1976). This definition was first drafted by a special subcommittee of attorneys. The Supreme Court ordered release of the proposed definition and solicited public comments. These comments brought about one addition

tc the proposed definition. The definition as adopted in 1938 remains unchanged today.

The Supreme Court was also authorized to create the Virginia State Bar "to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under the article for such proceedings as may be necessary." Va. Code Ann. § 54-49 (1974 Repl. Vol.) The defendant, Virginia State Bar (State Bar), was created pursuant to this authority by the Rules of the Supreme Court of Virginia (Rules of the Court) in 1938. Each attorney practicing law in Virginia is required by statute and the Rules of the Court to be a member of the State Bar. Va. Code Ann. § 54-49 (1974 Repl. Vol.); Rules of the Supreme Court of Virginia, Part Six, Rule 6:IV, ¶ 2, 216 Va. 1141 (1976). The powers of the State Bar have been delegated by the Supreme Court of Virginia to a Council comprised of at least one attorney elected from each judicial circuit in Virginia and six attorneys appointed at large by the Supreme Court of Virginia. The current President, President-elect, and immediate past President of the State Bar serve as *ex officio* members of the Council. Rules of the Supreme Court of Virginia, Part Six, Rule 6:IV, ¶ 5, 216 Va. 1143 (1976). The Council currently consists of fifty-six elected or appointed members and the three *ex officio* members.

When the Virginia Supreme Court established the State Bar, it also promulgated rules governing the Bar's organization and government as well as those relating to the Council. Among the various powers vested in the Council is the power to render advisory opinions. Rules of the Supreme Court of Virginia, Part Six, Rule 6:IV, ¶ 9(i), 216 Va. 1146 (1976). Any active member of the State Bar may

solicit an advisory opinion "on any question of contemplated professional conduct of such member, and upon such application the Council, or a Committee of the Council appointed for the purpose, shall render such an opinion. In the event the opinion is rendered by a Committee, such member shall have the right of appeal to the Council." Rules of the Supreme Court of Virginia, Part Six, Rule 6:IV, ¶ 10, 216 Va. 1147 (1976). The by-laws of the Council establish five-member committees, appointed by the President from its membership, for both Legal Ethics and Unauthorized Practice of Law. Rules of the Supreme Court of Virginia, Part Six, Rule 6:V, Art. VIII and IX, 216 Va. 1173-1174 (1976).

The advisory opinions are not rendered in an adjudicative or adversarial context. The advisory opinions relating to the unauthorized practice of law are deemed to be of general application. Accordingly, the State Attorney General has advised State Bar members that the Virginia Conflict of Interest Act, Va. Code Ann. § 2.1-352, does not preclude a practicing attorney from voting with respect to an advisory opinion concerning the unauthorized practice of law.[4] Opinion of the Attorney General of the State of Virginia (July 24, 1974). There is also no provision made for review by any Court of the Unauthorized Prac-

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[4] Thus, Council members who engage either in a real estate-oriented practice or represent title companies were permitted to pass on the question of whether issuing title insurance constitutes the practice of law. As discussed *infra*, this issue can be of considerable economic concern to both the attorneys and their clients. The only disqualification that was mandated by the Council was that of Council member Edward R. Parker who had formerly represented the Northern Virginia Lawyers Association in the proceedings which led to the issuance of UPL opinions 43 and 44, which are central to this case. See note 5, *infra*.

tice of Law opinions. An amendment to the rules governing the State Bar to allow for judicial review of advisory opinions was proposed, but rejected by the State Bar in 1938. Accordingly, no opinion of the Ethics Committee or the Unauthorized Practice of Law Committee has ever been presented to or approved by the Supreme Court of Virginia. In short, advisory opinions are issued by lawyers in response to questions submitted by lawyers and no provision is made to inject the participation of non-interested parties into the process.

The area of unauthorized practice of law pertinent to the instant litigation relates to the activities of title insurance companies such as the plaintiff. In 1942, the Unauthorized Practice of Law Committee issued its opinion No. 17 in response to the following inquiry:

> "Should definition [sic] of practice of law be changed so that title companies should certify the validity of real estate and personal property titles?"

The opinion, adopted by the Council, recommended that the definition of the practice of law not be amended so as to allow title insurance companies to certify titles. This opinion is premised upon the belief that the certification of a title constitutes the practice of law within the meaning of the definition articulated by the Supreme Court of Virginia. The absence of an attorney-client relationship between the company and a prospective purchaser of title insurance was viewed to be a source of potential abuse which greatly outweighed the possible benefits accruing to the public should title insurance companies be permitted to certify titles.

The Committee considered the problems associated with title insurance companies again in 1973. This consideration

stimulated much debate[5] within the profession and resulted in the issuance by the Committee of two opinions which were adopted by the Council. Unauthorized Practice of Law Opinion 43 states that a title company would be engaging in the unauthorized practice of law should it issue a title insurance policy to a non-lawyer based upon a title examination conducted by lay employees of the company. This conclusion rests upon the proposition that issuing title insurance constitutes the rendering of a legal opinion as to the sufficiency of a title and is taken to be such by a lay person. The underlying proposition was deemed to be unaffected by the title insurance company's disclaimer, to be issued with each commitment, policy or binder, to the effect that:

> THIS IS A TITLE INSURANCE (COMMITMENT) (POLICY) (BINDER) AND IS NOT A TITLE OPINION. THERE MAY BE MATTERS OF RECORD OR NOT OF RECORD WHICH AFFECT THE PROPERTY DESCRIBED IN SCHEDULE A, WHICH ARE NOT LISTED IN SCHEDULE B, AND WHICH THE

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[5] A title insurance company proposed to provide title binders (commitments to insure) to attorneys for a set fee on the basis of title searches and abstracts conducted by the title company's employees. After reviewing the abstract, the attorney could then certify the title to the title insurance company and the home buyer and the company would issue commitment to insure. This proposal was opposed by the Northern Virginia Lawyers Association. The contending forces presented the issues to the UPL Committee which proposed UPL opinion 41. The Council held an open meeting on proposed UPL 41 on October 26, 1973, at which time it was decided that the opinion should be broken down into two opinions which subsequently became UPL 43 and 44. Opinions 43 and 44 were adopted June 20, 1974. The latter opinion was not made effective until the adoption of Ethics Opinion 177 which, along with UPL Opinion 46 was adopted January 24, 1975.

COMPANY HAS DETERMINED TO ACCEPT AS AN UNDERWRITING RISK.

The proposed practice, falling within the Virginia Supreme Court's general definition of the practice of law coupled with the absence of an attorney-client relationship and accompanying ethical protections, was deemed to present an unacceptable risk to the unwary consumer. Unauthorized Practice of Law Opinion 44 holds that upon the request of an attorney, a title insurance company may search a title and furnish such title information to the attorney and issue a commitment, or binder to insure, to whomever the requesting attorney may designate. The presence of an attorney in the transaction, so that opinion holds, "eliminates the evils against which the proscription is directed: reliance by layman upon services which are implicitly offered to him as the product of legal knowledge or skill." Related to Opinion 44 was Ethics Opinion 177 which outlines an attorney's responsibility in situations arising under Opinion 44. The Unauthorized Practice of Law Opinion 46 was also adopted at the same time. That opinion approves of title companies providing the results of their title searches directly to customers with staff counsel who request the information. The Unauthorized Practice of Law Opinions 44 and 46 as well as the Ethics Committee Opinion 177 became effective on January 25, 1975.

The plaintiff was organized in November of 1975 in order to act as an agent on behalf of out-of-state companies selling title insurance directly to home buyers. The plaintiff operates its business largely within the Tidewater area of Virginia. The plaintiff proposes to lower the cost of title insurance by eliminating the services of an attorney in a transaction between the purchaser of such insurance and the title insurance company. The purchaser of title insurance

would deal directly with the plaintiff and would be able to look only to the plaintiff if there were a defect in the title. The plaintiff currently utilizes attorneys in conducting title searches, but admittedly plans to utilize trained lay personnel should it prevail in this action. It is uncontroverted that the plaintiff's business approach would result in the consumer receiving greater services than presently offered at a substantially lower cost. For example, the affidavits and exhibits filed in this cause indicate that the consumer could save as much as $211.00 on the charges typically made in the Tidewater area for title insurance on a $30,000 home. The contemplated savings for such insurance on a $60,000 and $100,000 home are stated to be $491.00 and $871.00, respectively. It is further represented that additional services such as surveying the tract would be included in the insurance package.

In regard to the instant controversy, there are two essential elements involved in the transfer of real estate. First, a deed must be prepared. The Supreme Court of Virginia has held that only an attorney may prepare this document. *Commonwealth v. Jones & Robins*, 186 Va. 30, 41 S.E.2d 720 (1941). The plaintiff has no quarrel with that decision. Secondly, title insurance is generally required by a lender as a condition of the loan obtained whenever financing is necessary. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 (1975). The plaintiff proposes to sell title insurance directly to the consumer and thereby exclude the attorney and, concomitant therewith, the attorney's fee, from the insurance transaction. The advisory opinions issued by the defendant state that this exclusion of the lawyer places the transaction in contravention of the prohibition against the unauthorized practice of law. Unauthorized Practice of Law, Opinion No. 17, August 5, 1942; Unauthorized Practice of Law, Opinion No. 43, June 20, 1975. The Supreme Court

of Virginia, however, has not yet expressed its view on the subject. The defendant's opinions, nonetheless, raise the powerful spectre of disciplinary action to any attorney who participates in a real estate transaction wherein the title insurance is obtained without the services of a lawyer. *See Goldfarb, supra,* 421 U.S. at 791, n.21. The net effect, predictably, is that attorneys, who are essential to the plaintiff's business, refuse to prepare deeds in transactions where the plaintiff provides the title insurance under its proposed method of doing business. Indeed, only ten of the approximately two hundred to three hundred attorneys contacted by the plaintiff expressed any interset in performing serivces for it.

To paraphrase *Goldfarb,* a more classic illustration of a group boycott is difficult to conjure. *See United States v. General Motors Corp.,* 384 U.S. 127, 145-46 (1966); *Silver v. New York Stock Exchange,* 373 U.S. 341, 347 (1963); *Radiant Burners v. Peoples Gas Co.,* 364 U.S. 656, 659 (1961); *Klor's v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 211 (1959); *Associated Press v. United States,* 326 U.S. 1, 12-14 (1945); *Fashion Originator's Guild v. FTC,* 312 U.S. 457 (1941). The opinion issuing process has also resulted in the attempted extension of a monopoly from an area sanctioned by the Supreme Court of Virginia (drafting titles) to an area which that Court has yet to address (title insurance). There is, moreover, no question but that the transfer of real estate in Virginia involves and substantially affects the flow of commerce between the states.[6] *See Goldfarb, supra,* 421 U.S.

[6] In addition to plaintiff, there are numerous other agencies/ title insurance companies doing business in the Tidewater area. Of the three largest companies, two are headquartered outside of Virginia (Chicago Title Insurance Company and Pioneer Title Insurance Company), and the net proceeds from all sales of those (Continued)

at 783-85. There is similarly no disputing that the defendant's issuance of Unauthorized Practice of Law opinions has had an anticompetitive effect, if not purpose.[7] Accord-

[6] (Continued)
two companies are transmitted to their headquarters outside of Virginia. None of the other title insurance agencies or title insurance companies offers packages of services similar to those of plaintiff.

During the calendar year 1975, the United States Department of Housing and Urban Development, which is headquartered in Washington, D.C., acting pursuant to 12 U.S.C. § 1706c, insured the mortgages on 1,342 single family homes in the Tidewater area in the amount of $32,769,650. In fiscal year 1976, acting pursuant to 38 U.S.C. § 1810, the United States Veterans Administration, which is also headquartered in Washington, D.C., guaranteed loans on 5,410 homes in the Tidewater area in the amount of $179,952,858. Most of the homes for which plaintiff has written title insurance have been homes on which there was either a Veterans Administration guarantee or insurance from the Housing and Urban Development Department. In Virginia, as elsewhere, title insurance is generally required by lenders in order to obtain a loan for the purchase of a home.

[7] The Court, at this juncture, is not in a position to reach any conclusion with regard to the intent of the defendant. There are sufficient indications in the record, however, to question whether the UPL opinions concerning title insurance were based entirely on considerations of public interest. UPL Opinion 17 decries title insurance companies of "depriving the resident attorneys of a large volume of such practice in which they would otherwise be employed." Briefs submitted by the Northern Virginia Lawyers Association in connection with UPL Opinions 41, 43 and 44 warned of title insurance companies placing in jeopardy the position of the attorney in real estate transactions. In considering UPL Opinion 41, a Council member stated "[N]o one has to tell us what it feels like to have one's practice threatened by this type of thing." The opposition to title insurance companies issuing policies without the services of an independent lawyer was characterized by another as a concern over taking "bread out of our mouths." Council Meeting of the Virginia State Bar, In Re: UPL Opinion Number 41, pp. 10, 16 (October 26, 1973).

ingly, the Court is satisfied that the conduct in issue, if accomplished by a wholly private enterprise, would violate both Sections 1 and 2 of the Sherman Act.[8]

The defendant contends that it is exempt from federal antitrust laws under the doctrine set out in *Parker v. Brown*, 317 U.S. 341 (1943).[9] In *Parker v. Brown*, state officials were held to be immune from liability under the federal antitrust laws for activity which would have constituted a violation of those laws had it been the product of private action. At issue in *Parker* was a legislatively mandated marketing program whose purpose was to restrain price competition in the raisin industry.

The Supreme Court explicated the *Parker* doctrine in two recent cases. In *Goldfarb v. Virginia State Bar, supra*, the

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[8] Group boycotts are said to be *per se* violations of the Sherman Act. *Silver v. New York, supra*, 373 U.S. at 347 and cases cited therein. There is a split of authority as to whether the *per se* or rule of reason test should be applied to substantive antitrust claims involving the practices of professions. *Compare United States v. National Society of Professional Engineers*, __F.2d__, No. 76-1023 (D.C. Cir. March 14, 1977) *with Feminist Women's Health Center, Inc. v. Mohammad*, 415 F. Supp. 1258, 1263 (N.D. Fla., 1976). The Court need not reach this precise issue as it concludes that the practice in question can not withstand the less demanding rule of reason analysis.

[9] The *Parker* doctrine is frequently articulated in terms of being an "exemption" from the antitrust laws. *See, e.g., Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 780. The doctrine, however, is founded on the concept that the Sherman Act was never intended to apply to all state action in the first instance. *See* Handler, The Current Attack on the *Parker v. Brown* State Action Doctrine, 76 Col. L. Rev. 1, 9 (1976). It is also clear that the doctrine predates *Parker v. Brown*. *See Olsen v. Smith*, 195 U.S. 332, 344-45 (1904). The Court, for the purposes of consistency, adopts the terminology utilized by the *Goldfarb* Court.

Court found a minimum fee schedule maintained by the State and local bar associations and enforced through the prospects of disciplinary action and professional norms to constitute a classic illustration of price fixing. In rejecting the state action immunity asserted by the defendants, the Court noted

> "[T]he *threshold inquiry* in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is *required* by the State acting as sovereign. . . Here we need not inquire further into the state action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules *required* the anticompetitive activities of either respondent . . . It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be *compelled* by direction of the State acting as a sovereign." *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 790-791 (citations omitted and emphasis added).

The most recent Supreme Court pronouncement in this area was in *Cantor v. The Detroit Edison Co.*, ___U.S.___, 44 U.S.L.W. 5357 (U.S. July 6, 1976). In *Cantor*, the defendant utility provided light bulbs to its customers and included the costs of same in its operating costs. As a result of this practice, the rates approved by the Michigan Public Service Commission reflected the costs of the light bulbs. The practice was both approved by and unalterable without the consent of the Michigan State Public Service Commission. This Commission was legislatively empowered to regulate the distribution of electricity. Six Justices concurred to the effect that the state action exemption from the antitrust laws was inapplicable. A plurality of four

Justices rested this holding on the fact that the practice was wholly, or at least predominantly, private conduct initiated by a non-public entity. Mr. Chief Justice Burger concurred in part, preferring to base the decision solely on the absence of a state policy governing the distribution of light bulbs. Mr. Justice Blackmun concurred in the judgment on the grounds that the anticompetitive harms of the practice outweighed its benefits.

The precise scope of the state action exemption is not entirely clear. It does appear that *Goldfarb* and *Cantor* narrow the applicability of the *Parker*-doctrine from what was once viewed as its parameters. *See, e.g., Litton Systems, Inc. v. Southwestern Bell Telephone, Inc.*, 539 F.2d 418, 423 (5th Cir. 1976). The Court's footnote 17 in *Goldfarb* also indicates that practices of professions are not to be viewed in precisely the same manner as the practices of other business activities. *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 787 n.17.[10] Just how the antitrust laws apply to the regulation of professions is an evolving area of law.

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[10] That footnote reads:

> The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

The Fifth Circuit Court of Appeals reasons that the exemption applies only when the anticompetitive restraint in issue lies within the intent of the authorizing mandate of the State. *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976). Thus, that Court reasoned that the minimum fee schedule in *Goldfarb* would have enjoyed immunity if the Virginia Supreme Court had required the same, and such action fell within the scope of its authority to regulate the practice of law. *City of Lafayette v. Louisiana Power & Light Co., supra*, 532 F.2d at 434 fn. 7 and 8. A similar approach has been adopted by the Third Circuit Court of Appeals. *Duke & Company, Inc. v. Foerster*, 521 F.2d 1277, 1280 (3d Cir. 1975).[11]

The Ninth Circuit Court of Appeals addressed the state action exemption issue in the context of professional regulation. That Court interpreted *Cantor* and *Goldfarb* as meaning that "to survive a Sherman Act challenge a particular practice, rule, or regulation of a profession, whether rooted in tradition or the pronouncements of its organizations, must serve the purpose for which the profession exists, *viz.* to serve the public. That is, it must contribute directly to improving service to the public. Those which only suppress competition between practitioners will fail to survive the challenge. This interpretation permits a harmonization of the ends that both the professions and the Sherman Act serve." *Boddicker v. Arizona State Dental Ass'n*, ____ F.2d ____, 1977-1 Trade Case ¶ 61,258 at 70,797 (9th Cir. Jan. 6, 1977) (footnotes omitted). Recently, the

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[11] The Fourth Circuit Court of Appeals in a post-*Cantor* and *Goldfarb* case found *Parker v. Brown* to be inapplicable where the state took no action to compel the defendant to engage in the alleged illegal action. *Ballard v. Blue Shield of Southern West Virginia*, __F.2d __, No. 75-1982, Sl. Op. at 11-12 (4th Cir. October 19, 1976.

District of Columbia Circuit Court of Appeals, while not ruling on the state exemption issue, intimated that anticompetitive practices of professions taking the form of ethical rules might survive a Sherman Act challenge where such practices are "narrowly confined to interdiction of abuses." *United States v. National Society of Professional Engineers*, ___ F.2d.___, No. 76-1023, Sl. Op. at 11 (D.C. Cir. March 14, 1977).

From these cases, the Court cautiously discerns the following analytical principles applicable to the instant controversy. The "threshold inquiry" is whether the contested activity is *compelled* by the state acting as sovereign. *Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 790. State authorization, approval, encouragement, or participation in restrictive activity does not confer antitrust immunity. *Cantor v. The Detroit Edison Co., supra,* ___U.S. ___, 44 U.S.L.W. at 5361. A negative answer to this threshold question terminates the analysis and no immunity would be afforded the defendant. *Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 790-91; *Ballard v. Blue Shield of Southern West Virginia,* ___F.2d ___, No. 75-1782 , Sl. Op. pp. 11-12 (4th Cir. Oct. 19, 1976). The use of the terms "threshold inquiry," "state action of the type the Sherman Act was not meant to proscribe," and "further inquiry" by the *Goldfarb* Court strongly suggest that an affirmative answer demands further analysis. *Goldfarb v. Virginia State Bar, supra,* 421 U.S. at 790. *See* Robinson, Recent Antitrust Developments: 1975, 76 Col. L. Rev. 191, 212 (1976).

Just what further analysis is required is admittedly not entirely clear. The plurality opinion in *Cantor* in which the Chief Justice joined states that an exemption from the antitrust laws is not available unless "that exemption was necessary in order to make the regulatory act work, 'and even

then only to the minimum extent necessary.' " *Cantor v. The Detroit Edison Co.,* ___U.S. ___, 44 U.S.L.W. at 5362-63. This approach, articulated in the context of what was deemed to be private conduct, involves a determination of whether the anticompetitive activity is necessary to accomplish the regulatory purpose of that agency. Mr. Justice Blackmun articulated a slightly different standard in his concurring opinion.

> "I would apply, at least for now, a rule of reason, taking it as a general proposition that state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits. This does not mean that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of such harm and benefits . . . I would assess the justifications of such enactments in the same way as is done in equal protection review, and where such justifications are at all substantial (as one would expect them to be in the case of most professional licensing or fee-setting schemes, for example. . .) I would be reluctant to find the restraint unreasonable." *Cantor v. The Detroit Edison Co.,* ___ U.S. ___, 44 U.S.L.W. at 5666-67.

The Ninth Circuit Court of Appeals phrased the analysis in terms of whether the anticompetitive activity contributes directly to improving service to the public or only to suppress competition. *Boddicker v. Arizona State Dental Ass'n, supra.* These different formulations share the common thread of focusing on the relationship between the anticompetitive activity and the state interest it purports to advance. If that relationship is tenuous, the activity must fall. *See* Sla-

ter, Antitrust and Government Action: A Formula for Narrowing *Parker v. Brown*, 69 Nw. L. Rev. 71, 104-109 (1974).

The Court is of the view that the issuance of Unauthorized Practice of Law and Ethical opinions by the defendant is compelled by the Commonwealth of Virginia. Acting pursuant to statutory[12] and inherent[13] authority, the Supreme Court of Virginia has created the State Bar and promulgated the rules and by-laws from which the Ethical and Unauthorized Practice of Law opinion processes have emerged. The State Bar, acting through its Council or the appropriate Committees, is required to render, at the request of a member, advisory opinions on contemplated professional conduct. See Rules of the Supreme Court of Virginia, Part Six, Rule 6:IV, ¶ 10, Rule 6:V, Art. VIII, IX and XIII, 216 Va. at 1147, 1173-74 (1976).[14] These directives are not couched in the

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12 Va. Code Ann. §§ 54-48, 54-49 (1974 Repl. Vol.).

13 *Button v. Day*, 204 Va. 547, 132 S.E.2d 292 (1963) cited in *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 789 n.18.

14 Rule 6:IV, ¶ 10 reads as follows:

> 10. Advisory Opinions.—Any active member of the Virginia State Bar may apply to the Council for an advisory opinion on any question of contemplated professional conduct of such member, and upon such application the Council, or a Committee of the Council appointed for the purpose, *shall render such opinion.* In the event the opinion is rendered by a Committee, such member shall have the right of appeal to the Council. (Emphasis added). 216 Va. 1147 (1976).

Rule 6:V, Art. IX reads as follows:

ARTICLE IX

Committee on Unauthorized Practice of the Law

(Continued)

permissive "may," but rather are expressed in the mandatory phrase "shall render such opinion". Thus, unlike the light bulb distribution system of *Cantor* or the minimum fee schedule in *Goldfarb*, the issuance of opinions on the unauthorized practice of law is the product of the command of the state.

The Court finds, nonetheless, that this practice must fall under the antitrust laws. While cognizant that the advisory opinion process enjoys the sanction of the state, the harms of the system greatly outweigh its purported benefits. The states have "a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety and other valid interests, they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Virginia State Bar, supra*, 421 U.S. at 792. Re-

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14 (Continued)

> A Standing Committee of five members of the Council, to be appointed by the President and to be known as the Committee on the Unauthorized Practice of the Law, is hereby created. All powers and duties of the Council with respect to the unauthorized practice of law, not otherwise delegated or reserved, *shall* be exercised and discharged by the Committee. (Emphasis added). 216 Va. 1173 (1976).

Rule 6:V, Art. XIII reads as follows:

ARTICLE XIII

> All committees, District or Standing, shall refer to the standing committees on Professional Ethics, Unauthorized Practice of the Law, and Judicial Ethics, such questions arising before them as are appropriate for opinion by the respective committees, and such committees *shall render advisory opinion* upon which the Committee asking same shall act. (Emphasis added). 216 Va. 1179 (1976).

stricting the practice of law to persons licensed by the state is both a legitimate and necessary exercise of this power. The underlying rationale behind this grant of a monopoly is twofold: (1) it insures that persons rendering legal services are qualified to do so; and (2) it subjects persons rendering such services to the Virginia Code of Professional Responsibility, Rules of the Supreme Court of Virginia, Part Six, Rule 6:II, 216 Va. 1064 (1976). *See Commonwealth v. Jones & Robbins,* 186 Va. 30, 41 S.E.2d 720 (1941); *Richmond Ass'n of Credit Men v. Bar Ass'n of Richmond,* 167 Va. 327, 189 S.E. 153, 159-61 (1937); *Bryce v. Gillespie,* 160 Va. 137, 168 S.E. 653, 656 (1933). Both of these considerations serve to advance the interest of the consuming public by insuring the quality of legal services and imposing upon lawyers a degree of accountability to the state.

The Unauthorized Practice of Law opinion process, as it presently operates, is not, in the Court's view, sufficiently related to those interests to justify its anticompetitive effects. Criminal sanctions are available to deter and punish laymen who might engage or have engaged in the unauthorized practice of law. Va. Code Ann. § 54-44.[15] The advisory opinion process, moreover, cannot reasonably be said to deter those from whom the public may need protection as only licensed attorneys may obtain these opinions. The layman contemplating conduct which might constitute the practice of law, and hence from whom the public needs protection, has no access to the defendant's advisory opinion process. Thus, it would appear that the persons who the State desires to deter and who have the greatest need

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15 Additionally, the Attorney General is authorized to employ special counsel to investigate and prosecute any person engaged in the unauthorized practice of law. Va. Code Ann. § 2.1-125 (1973 Repl. Vol.).

for advisory opinions are excluded from the process presently under attack. It may be argued that the disciplinary rule pertaining to aiding the unauthorized practice of law[16] generates a need for advisory opinions. The irony of this argument is manifest. One facet of the practice of law is advising clients as to the legality of a proposed course of conduct. Thus, lawyers are reputed to possess special expertise in interpreting statutes and judicial decisions and applying the distilled principles of law to future actions. Attorneys as a class, therefore, should be the last segment of society in need of advisory opinions pertaining to the Virginia Supreme Court's definition of the practice of law. To contend that attorneys require these advisory opinions is to deny the very expertise which serves as partial justification for placing restrictions on who may practice law.

The Unauthorized Practice of Law opinion process places attorneys in the unique position of being able to define the extent of their own monopoly. It belabors the obvious to point out that lawyers in general would financially benefit from an expansive definition of the practice of law. The danger is crystalized under the facts of the instant case.[17] An attorney engaged in a real estate oriented practice stands to lose substantial fees should the issuance of title insurance be held to lie outside the parameters of the Virginia Supreme Court's definition of the practice of law.

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16 Rules of the Supreme Court of Virginia, Part Six, Rule II: DR 3-101(A), 216 Va. 1090 (1976).

17 The Court's remarks here should not be taken as a comment on the merits of any particular UPL opinion or a suggestion of ethical impropriety on the part of any member of the bar. The Court is merely pointing out the anticompetitive dangers inherent in the UPL opinion process.

This direct pecuniary interest highlights the infirmity of the system as it now operates. *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973). The absence of judicial participation aggravates the anticompetitiveness of the Unauthorized Practice of Law opinion process. The State Bar rules make no provision for court review of such opinions. All of the opinions issued to date have become effective without the consideration or approval of the Supreme Court of Virginia. Thus, that organ of the State vested with responsibility for defining the practice of law has yet to intimate its authoritative views on the title insurance issue.

There is nothing in the instant record, moreover, that indicates that either the legislature or the Supreme Court of Virginia intended to restrain competition between lawyers and laymen in areas which arguably do not lie within the definition of the practice of law. The state policy behind restricting the practice of law to licensed attorneys is to protect the public and not, as was the case in *Parker v. Brown*, to financially benefit a particular segment of society. That intent is thwarted when, as here, the regulatory activity serves an anticompetitive end without necessarily improving the services rendered to the consuming public.

In summary, not only is the Unauthorized Practice of Law opinion process tenuously related to the state interest it purports to advance, but it operates in a decidedly anticompetitive fashion offensive to notions of basic fairness. It does not act to advance the consumer interest, but merely that of the attorney. It is neither necessary to, nor are its anticompetitive effects reasonable in light of,

the justifying state interest. Accordingly, the state action exemption is not available to the defendant.[18]

Both the plurality opinion and that of Mr. Justice Blackmun in *Cantor* indicate a defense to monetary liability may be available to a defendant based on notions of fairness. *Cantor v. The Detroit Edison Co.*, __U.S. at __and__; 44 U.S.L.W. at 5361-63 and 5366 n.6. *Cf. Feminist Women's Health Center, Inc. v. Mohammad*, 415 F. Supp. 1258, 1263 (N.D. Fla. 1976). The Court believes that this may be an appropriate case for such a defense. The issuing of the opinion resulting in the competitive activity here was required by the state. The Court will request that the parties address this issue further after the Court and counsel have the benefit of the Supreme Court's opinion in the case of *Bates v. State of Arizona* which is anticipated before the Court's current term ends in June.

An appropriate order will issue.

/s/ ROBERT R. MERHIGE, JR.
Robert R. Merhige, Jr.
United States District Judge

Date: April 25, 1977

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18 The defendant argues that the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013 exempts the regulation of title insurance from the antitrust laws. Title 15 U.S.C. § 1012(b) grants the business of insurance a qualified exemption from the Sherman Act. This exemption is specifically limited by 15 U.S.C. § 1013(b) which provides: "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." The Court is satisfied that the type of boycott involved herein is the type condemned by the McCarran-Ferguson Act. *See Ballard v. Blue Shield of Southern West Virginia*, __F.2d __, No. 75-1982, Sl. Op. pp. 9-10 (4th Cir. October 19, 1976).

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

SURETY TITLE INSURANCE AGENCY, INC., Plaintiff,	:	
v.	:	Civil Action
	:	**No. 76-0180-R**
VIRGINIA STATE BAR, Defendant.	:	

ORDER

For the reasons stated in the Memorandum of the Court this day filed and deeming it proper so to do, it is ADJUDGED AND ORDERED as follows:

(1) Defendant's motion for summary judgment be, and the same is hereby, denied; and

(2) The motion of the plaintiff for summary judgment be, and the same is hereby, in part, granted in the following respects: (a) the issuance by defendant of opinions or similar documents purporting to define the practice of law is unlawful and in the instant case is violative of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2; (b) the defendant, Virginia State Bar, its officers, agents and employees be, and they are hereby, enjoined from issuing any further opinions or documents purporting to define

the practice of law and said defendant is directed to expunge from its records all such prior opinions; further, the defendant, Virginia State Bar, through its appropriate officer shall forthwith notify its membership of said expungement.

All other matters in issue are hereby continued.

Let the Clerk send copies of this Order and the accompanying Memorandum to all counsel of record.

/s/ ROBERT R. MERHIGE, JR.
Robert R. Merhige, Jr.
United States District Judge

Date: April 25, 1977

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1703

SURETY TITLE INSURANCE AGENCY, INC.,
Appellee,

v.

VIRGINIA STATE BAR,
Appellant.

O R D E R

Upon consideration of the appellee's petition for rehearing and suggestion for rehearing *en banc,* and no judge having requested a poll on the suggestion for rehearing *en banc,*

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Russell for a panel consisting of Judge Russell, Judge Hall, and Judge Thomsen.

For the Court,

/s/ William K. Slate, II
Clerk

A True Copy, Teste:
William K. Slate, II, Clerk

By /s/ EMILY RUEGER
Emily Rueger

[Filed April 3, 1978]
